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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 273.

Office Supreme Court, U. S.
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DAVID KAWANANAKOA, JONAH KALANIANAOLE, ABIGAIL W. KAWANANAKOA, AND ELIZABETH K. KALANIANAOLE,
Appellants,

vs.

ELLEN ALBERTINA POLYBLANK, otherwise known as SISTER ALBERTINA, Trustee for STELLA KEOMAILANI COCKETT, and STELLA K. COCKETT, Sole Beneficiary Under Said Trust,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLANTS.

SIDNEY M. BALLOU,
Attorney for Appellants.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
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STATEMENT OF THE CASE.

This is a suit in equity, originally brought in a Circuit Court of the Territory of Hawaii, to foreclose a mortgage executed by defendants-appellants to Ellen Albertina Polyblank, plaintiff-appellee, as Trustee for Stella J. Cockett, plaintiff-appellee.

The German Savings and Loan Society, as holder of a subsequent incumbrance, was made a party defendant in the court below and the Territory of Hawaii was also joined as a party defendant as being a subsequent grantee of a part of the mortgaged premises.

It appears from the record that subsequent to the execution of the mortgage the appellants sold a portion of the mortgaged premises to Samuel M. Damon and that subsequently Samuel M. Damon conveyed the same to the Territory of Hawaii. This land was subject to the mortgage and was held at the time of the suit and is still held by the Territory of Hawaii. Nevertheless the plaintiffs below, after certain preliminary pleadings, filed their dismissal as to the Territory of Hawaii (Trans. page 23), and the case thereafter proceeded without this holder of part of the mortgaged premises and against the objection of the defendants, appellants herein, that there was a defect of parties (Trans. page 31) and that no decree should be entered against said defendants, appellants herein, for the foreclosure of said mortgage or for a sale of any part of said premises unless and until the Territory of Hawaii should be brought before the court.

There was no dispute as to these facts at the trial but the Circuit Judge overruled the contention of Appellants and signed a decree of foreclosure ordering the sale of the mortgaged property, omitting the portion held by the Territory of Hawaii, and authorizing the entry of a deficiency judgment against said appellants for the balance remaining due after said sale. On appeal the Supreme Court of the Territory affirmed the decree, holding that a suit to foreclose a mortgage may be brought against the mortgagors without joining a subsequent purchaser of a portion of the mortgaged premises, and a deficiency judgment against the mortgagors may be authorized without first foreclosing the interest of the subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

From that final decree of the Supreme Court of the Territory of Hawaii the mortgagors, Kawananakoa and Kalanianaole and their wives, have appealed to this Honorable Court, The German Savings and Loan Society refusing to join in the appeal.

SPECIFICATION OF ERRORS.

Appellants say that the decree of the Supreme Court of the Territory of Hawaii is erroneous in two particulars, to-wit:

(1) That said decree holds that a suit to foreclose a mort-

gage may be brought against the mortgagors without joining a subsequent purchaser of a part of the mortgaged premises as a defendant.

(2) That said decree holds that in a suit to foreclose a mortgage the court may authorize the entry of a deficiency judgment against the mortgagors without selling a part of the mortgaged premises held by a subsequent purchaser when that subsequent purchaser is the Territory of Hawaii.

ARGUMENT.

I.

The owners of the equity of redemption of all parts of the premises covered by a mortgage must be made defendants in a suit in equity to foreclose that mortgage.

The result of a violation of this rule is that the whole burden of the mortgage debt will be placed on a part of the land instead of being distributed pro rata over the whole thereof, which would be manifestly unjust.

See *Detweiler v. Holderbaum*, 42 Fed. 337.

Not one of the authorities cited on this question by the Supreme Court of the Territory (Trans. page 43) is in point because each one of them is a case of foreclosing against the original mortgagor without joining the holder of the equity of redemption of the entire premises, in which case the foreclosure is good as far as it goes, and the holder of the equity has the right to redeem. In the case at bar, as in *Detweiler v. Holderbaum, supra,* the premises have become divided among several coördinate interests, all of which, according to that decision, should be before the court.

II.

No deficiency judgment should be entered against the mortgagors until all of the mortgaged premises have been sold and the proceeds applied to the payment of the mortgage debt.

We believe that the justice of this, as a general rule, is

obvious. In a foreclosure proceeding the land is the primary fund to which the mortgagee is resorting for payment and the personal obligation of the mortgagor is secondary, to be resorted to only after the exhaustion of the security.

It is true that a mortgagee may waive the mortgage and sue in assumpsit on the note and recover judgment against the mortgagors for the full amount of the debt, but having elected to pursue his other remedy of foreclosure he is compelled to follow the course appropriate to that procedure.

"In a case like this (foreclosure by bill in equity) it seems to us that no personal judgment for any specific sum of money can be rendered even against the mortgagor, until the mortgaged premises have been sold, and the proceeds applied to the mortgage debt; for he can only be called upon, in such an action, to pay any deficiency in the proceeds of the sale of the property pledged by him for payment of the debt; and we do not see how such deficiency can be ascertained until the property has been sold, and the proceeds applied, and hence we do not see how any judgment for any specific sum of money can be rendered until the amount of such deficiency has been thus ascertained. * * * Of course the plaintiffs, if so disposed, might have brought an ordinary action at law on the note, in which event they would have been entitled to recover judgment, and issue execution for the whole amount due upon the note. But they had a choice of remedies,—the ordinary action on the note and a proceeding to foreclose the mortgage; and having adopted the latter, they must be required to pursue the course appropriate to such a proceeding."

Hall v. Young, 29 S. C. 64.

The mortgagees having elected to proceed by foreclosure, we do not think there will be any question raised as to the general principle that the security must be exhausted by a sale of the entire mortgaged premises before a personal judgment for the deficiency can be rendered.

The jurisdiction of courts of equity to render deficiency judgments in suits for the foreclosure of mortgages is purely statutory.

Wiltsie on Mortgage Foreclosures, Sec. 601.
Orchard v. Hughes, 1 Wallace 73, 77.
9 Ency. of Pl. and Pr. 451.

The exact source of authority for the practice of entering deficiency judgment in the Territory of Hawaii is somewhat doubtful. It may be found in Section 2169 of the Revised Laws of 1905 or more probably in Equity Rule 92 of the Supreme Court of the United States. In either case the rule is general that the security must be exhausted before a personal judgment for the deficiency can be rendered.

Bull v. Coe, 77 Cal. 54, 60.
Powell v. Patison, 100 Cal. 236, 239.
Clapp v. Maxwell, 13 Neb. 542, 543.
Seckel v. Backhaus, Fed. cases No. 12, 599.

The main issue of the case, however, is raised by the contention that this case is an exception to the general rule because the part of the mortgaged premises which we contend should be sold before a deficiency judgment is entered is now vested in the Territory of Hawaii. This alleged exception is based on the pretended exemption of the Territory of Hawaii from suit except as expressly authorized by its own legislature, in Chap. 129 of the Revised Laws of 1905.

There seem to be two possible arguments in support of this alleged exemption, (a) that the Territory has not the capacity to be sued in a case of this kind; and (b) that although having the capacity, it has the right to designate under what terms and conditions it may be sued and to exempt itself from suit in other cases.

In a previous decision upon the liability of the Territory to be sued both of these grounds were apparently relied upon, although they appear to be inconsistent with each other.

Coffield v. Territory of Hawaii, 13 Haw. 478.

A. The Territory of Hawaii has the capacity to be sued

So far as the first point is concerned we contend that the Territory of Hawaii is a municipal corporation with capacity to sue and be sued. A municipal corporation may be defined as follows:

"We may therefore define a municipal corporation to be the incorporation by the authority of the government of the inhabitants of a particular place or district and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concern. This power of local government is the distinguishing feature of a municipal corporation proper."

1 Dillon on Municipal Corporations, Sec. 20.

"Although not styled such, each one of the United States in its organized political capacity, is in effect a public corporation."

1 Dillon Municipal Cor., Sec. 31.

"Every State is a corporation, and as such may make contracts and may suffer and commit wrongs, and may enforce its rights and redress its injuries by civil action."

1 Sherman and Redfield, Negligence, Sec. 249.

"Even the United States may be said to be a corporation."

1 Sherman and Redfield, Negligence, Sec. 249.

"The most usual conception of a corporation is that it is a collection of natural persons joined together by their voluntary action or by legal compulsion by or under the authority of an Act of the Legislature to accomplish some purpose pecuniary, ideal or governmental, authorized by the legislature under a scheme of organization and by methods thereby prescribed or permitted, with the faculty of having a continuous succession during the period prescribed by the legislature for its existence; of having an individual name by which it may make and take contracts and sue and be sued, and of acting as a community in respect of all matters within the scope of the purpose for which it is created."

1 Thompson on Corporations, Sec. 1.

It is apparent that the Territory of Hawaii falls exactly within the definitions of Dillon and Thompson. It is equally apparent that the Territory is not in the least analogous to the quasi-corporations known as counties, townships or school districts which have not the complete right of local self-government in the sense that a municipal corporation proper has.

This Court has called the Territories "organized municipalities" and likened them to the District of Columbia.

"Ordinarily these terms (States of the Union) would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia."

Talbott v. Silver Bow County, 139 U. S. 438, 445.

"This Court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a State Legislature has over its municipal corporations."

Utter v. Franklin, 172 U. S. 416, 423.

The closest analogy that can be drawn is between the Territory of Hawaii and the District of Columbia. The latter has been held to be a municipal corporation.

Barnes v. District of Columbia, 91 U. S. 540.

Every municipal corporation may be sued.

It is entirely immaterial that the Organic Act is silent upon the right of the Territory to sue and be sued. These powers are inherent in all municipal as well as other corporations. In addition to the statement from Thompson on Corporations quoted above, in connection with the definition of a corporation, we may cite the following authorities:

"The creation by the legislature of a body corporate for any purpose impliedly confers upon it the power to sue and be sued so far as may be necessary to maintain its corporate rights and to enforce its corporate duties. In general it may be said that the power to sue and be sued is, by the principles of common law, an incident of every corporation."

6 Thompson on Corporations, Sec. 7360.

"Municipal corporations are subject to be sued upon contracts and in tort."

2 Dillon Municipal Corporations, Sec. 935.

See also Ingersoll on Public Corporations, page 492.

Prout v. Pittsfield Fire District, 154 Mass. 450.

City of Janesville v. Milwaukee, Etc., R. R. Co., 7 Wis. 484.

It has always been assumed since the passage of the Organic Act that the Territory has the power to sue, although such power is nowhere expressly conferred.

The Territory has assumed the right and capacity to bring suits, which capacity has never been questioned. Instances of civil suits in which the Territory has been plaintiff may be found in the Reports, as for example:

Territory of Hawaii v. Liliuokalani, 14 Haw. 88; Bill for Injunction.

Territory of Hawaii v. Oahu County Supervisors, 15 Haw. 365, Quo Warranto.

Territory of Hawaii v. Kerr, Bill for Injunction, 16 Haw 363.

Territory of Hawaii v. McCandless, Bill for Injunction, 16 Haw. 728.

Territory of Hawaii v. Cotton Bros., Tort, 17 Haw. 374, 445, 608, 618, 645.

The Territory has also been defendant in several suits, two of which have come before this court:

Damon v. Hawaii, 194 U. S. 154;
Carter v. Hawaii, 200 U. S. 255.

Within the past two years the Territory has created counties, giving each county the express power to sue and be sued in its corporate name. (Session Laws of 1905, Act 39, Section 9.) It can hardly be urged that the Territory could delegate a power which it did not itself possess, yet this enactment has been expressly sustained by the courts.

County of Oahu v. Whitney, 17 Haw. 174, 180.

B. The Territory of Hawaii cannot exempt itself from suit by its own legislative enactment.

As to the second point, we maintain that the Territory of Hawaii cannot by its own legislative enactments exempt itself from liability to suit or prescribe any certain class of cases in which alone it may be sued. The exemption of the United States and each of the several States from suit, except so far as is authorized by their own Legislatures, has nothing to do with the corporate capacity of either the United States or the several

States, but is a mere privilege which when waived leaves the sovereign State liable to suit like any other public corporation. It is based solely upon sovereignty, and the reading of any of the cases which discuss this principle will show how inapplicable the reasoning of those cases will be when applied to a Territory which has no sovereignty.

"The principle is elementary that the State cannot be sued in its own courts without its consent. This is a privilege of sovereignty."

Railroad Company v. Tennessee, 101 U. S. 337, 339.

"It is difficult to see on what solid foundation of the principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."

United States v. Lee, 106 U. S. 196, 206.

Both the language last above quoted and the decision itself show that the power is not one to be extended, and there is certainly no warrant for extending it to the case of a Territory which possesses no sovereignty whatever.

"But before a State is admitted into the Union,—that is, while it is in its Territorial condition,—it possesses no sovereignty whatever * * * during the Territorial period the general government has entire dominion and sovereignty, national and municipal, federal and state, over the Territories."

Carroll v. Price, 81 Fed. 137, 141.

See also *Talbott v. Silver Bow County,* 139 U. S. 438, 445.

It is true that there is on the statute books a claim of exemption on behalf of the Territory. (Revised Laws of Hawaii, Sec. 2000. Laws of the Republic, Act. 26.)

Although the language of this act has been altered in conformity with the political changes which have made Hawaii a Territory of the United States, the law was passed in 1894 at the time Hawaii was an independent Republic possessing full

sovereignty. It can be found in its original form in the Civil Laws of 1897, Section 1530. The entire Act is full of references to citizenship, allegiance and other matters directly pertaining to the exercise of a full sovereignty. So far as this Act may still be valid as a law of procedure for the prosecution of the claims thereby allowed we are not obliged to consider, but we claim that the exemption from actions therein claimed was an attribute of the sovereignty of the Republic of Hawaii and has been impliedly repealed by the Organic Act which has extinguished the last vestige of that sovereignty.

After an existence of nearly a century as an independent nation, it is perhaps not remarkable that the idea that the Territory possesses sovereignty or some of its attributes is hard to eradicate. Shortly after annexation the Supreme Court of the Territory of Hawaii claimed that there were two sovereignties then in force within the Territory.

In Re Wong Tuck, 11 Haw. 600.

Less than two weeks later, upon further argument, it was obliged to reverse itself upon this point.

"On a careful re-examination of the subject, with the additional light thus given, we believe that the conclusion reached by the majority of the court in the Wong Tuck case on this question of jurisdiction was not founded on a correct view of the law and that it should be reversed.

"The Hawaiian Islands are now a part of the territory of the United States. There are not two separate sovereignties here, such as exist in each of the States, within the meaning of the rules laid down in the Booth cases, 21 Howard 506. The decision in those cases is not, therefore, in point."

In Re Ah Ho, 11 Haw. 654, 658.

In a case of ejectment brought against the Territory counsel for plaintiff conceded that the Territory might be sued only in so far as it consented, and the validity of the Statute claiming exemption does not appear to have been questioned.

Bush v. Territory of Hawaii, 13 Haw. 1.

In the next case in which the Territory was sued the court refers to the general rule that a State is not liable to be sued

except by its consent, without reference to any possible distinction between a State and a Territory in this regard; and then, as already pointed out, bases its decision upon an alleged incapacity of the Territory to be sued, calling it a quasi-corporation as distinguished from a municipal corporation proper.

Coffield v. Territory of Hawaii, 13 Haw. 478.

We claim that the two cases last cited would have been good law under the Monarchy or the Republic, but are erroneous as applied to a Territory of the United States, the Court overlooking entirely, or failing to give due weight to the extinction of the sovereignty upon which exemption from suit can alone be based.

As we have said the closest analogy that can be drawn is between the Territory of Hawaii and the District of Columbia. Each is subject to the exclusive jurisdiction of Congress under clauses of the Constitution meaning substantially the same. Each has been granted a large measure of self-government by Congress. A discussion by this Court of the nature of the District of Columbia applies very accurately to the Territory of Hawaii.

"One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or Sovereignty according to the definition of writers of public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this Court in the case of *Hepburn v. Ellzey,* 2 Cranch 445, 452, where the question was whether a citizen of the District of Columbia could sue in the Circuit Courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power in cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the Government of

the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make these bodies sovereign." * * *

"We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons."

Metropolitan Rd. v. District of Columbia, 132 U. S. 1, 9.

See further as to the liability of the District of Columbia to be sued:

Barnes v. District of Columbia, 91 U. S. 540.

Moreover a mortgagee of land may have relief even against a sovereign State.

Where a person who has given a mortgage of lands is afterwards attainted, the mortgage may be set up against the State as having succeeded to the rights of the mortgagor.

Jackson v. Pierce, 10 Johns (N. Y.) 414, 417.

The English Chancery Courts refuse to order a sale against the Crown, but direct that the mortgagee shall hold and enjoy the mortgaged premises until the Crown thinks it proper to redeem the estate.

Lutwich v. Attorney General, cited in 2 Atkyns 223.

Hodge v. Attorney General, 3 Younge and Collyer Exch. 342.

Rogers v. Maule, 1 Younge & Collyer Ch. 4.

But even if no relief could be had against the Territory in this action, we submit that the mortgagee would not be entitled to a deficiency judgment against the mortgagors. She is entitled to such a judgment under Equity Rule No. 92 only upon a sale of the mortgaged land and if she is not able to compel a sale of all of that land even through no fault of her own, she cannot have deficiency judgment though she may have a remedy in some other proceeding.

The mortgagors, Appellants herein, are not responsible for

the misfortune, if misfortune there be, of the mortgagee. They did not convey to the Territory, but to a private individual who, at a subsequent date, conveyed to the Territory. It is obvious that the mortgagors were acting within their full rights and are not estopped from setting up the defense put forward in this cause.

We respectfully submit that the decree of the Supreme Court of the Territory of Hawaii should be reversed and the case remanded.

SIDNEY M. BALLOU,
Attorney for Appellants.